FILED

08-703 OCT 22 2008

OFFICE OF THE CLERK
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No. 08-703

In The
Supreme Court of the United States

DIANE KING,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

DIANE KING
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Petitioner Pro Se

November 24, 2008

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QUESTIONS PRESENTED

1. May the U.S. Court of Appeals for the Federal Circuit affirm a termination which violates the Civil Service Reform Act of 1978 (CSRA) and the Whistleblowers Protection Act (WPA)?

2. May the U.S. Court of Appeals for the Federal Circuit consider facts not in evidence when sustaining the termination of a whistleblower?

3. May the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit levy their own charges against a whistleblower? That is, charges not made by the employee's agency.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the Merit Systems Protection Board appears at Appendix C to the petition and is unpublished.

JURISDICTION

[x] For cases from federal courts.

The date on which the United States Court of Appeals decided my case was May 6, 2008. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 24, 2008, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2302, Title 5, United States Code provides in pertinent part:

Section 2302.(b)(8) (B).

(Retaliatory action may not be taken because of) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, information which the employee or applicant reasonably believes evidences–

(i) a violation of any law, rule, or regulation or
(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

STATEMENT OF THE CASE

This termination is a prohibited personnel practice. The Civil Service Reform Act of 1978 (CSRA), as amended by the Whistleblowers Protection Act (WPA), prohibits agencies from taking a personnel action with respect to any employee because of any disclosure to the Special Counsel of information which the employee reasonably believes evidences a violation of any law rule or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. See U.S.C. Section 2302(b)(8).

The MSPB sustained 2 of 4 charges.

1. Copying and removing confidential medical records of VA patient #0668. Specification: In an e-mail to Robert Ratliff, CAVHCS Director, dated June 28, 2006, you stated that you had copies of relevant lab work sheets and would provide them as soon as possible. On June 29, 2006, you hand delivered two microbiology worksheets to Michael C. Hubbard, CAVHCS Compliance Officer. When asked the name of the patient you replied, "I blocked off the name and last four before I took them home. You can get the patient's name off the lab order number." By copying and removing confidential VA medical records you violated Memorandum No. 136-04-09, which states that VA medical records are the property of VA and will not be removed from VA custody.

#4. Failing to follow the procedure for making entries to patient records. Specification: You made comments in patients #0668's Microbiology Worksheet on February 16, 2005, and March 17, 2005. Patient #0668 died February 15, 2005. On February 16, 2005, you wrote, "No enrichment media on East Campus. Specimen no Rx until after 0800 2/11/05." On March 17, 2005 you wrote, "Dr. Vacchani not informed specimen mishandled". These annotations are in violation of Memorandum No. 136-04-09, which specifically states that "..negative/critical documentation carry medical-legal implications and will not be indulged."

At page 5 of the MSPB decision, the Board states "the appellant admits that she made copies of the microbiology worksheet and she distributed them to third parties, entities outside of the agency such as the

Office of Special Counsel." The Department of Veterans Affairs was aware that I sent this disclosure to the OSC long before they effected the termination.

At page 8 of the transcript, the deciding official (Ratliff) admitted to having reviewed this document prior to effecting the termination. The MSPB also states that I eliminated an entry on a worksheet. But there was no elimination of an entry, nor did the agency charge me with this action. At page 19 of the transcript one finds the following testimony.

> Q. [Petitioner] Is that your contention, that I obscured the notation?
>
> A. [Deciding Official] I'm not contending anything. I just pointed out that it looked different.

The MSPB found that I failed to follow procedures for making entries to patient records. The agency cited Memorandum No. 136-04-09 in its specification as cited above. But the Memo in full pertinent part states the following:

> "Highlighting, underlining, exclamations, question marks, etc. will not be made by a third party to another writer's documentation. Such alterations, defacements and negative/critical documentation carry medico-legal implications and will not be indulged."

In no way do these sentences relate to my factual entries to the worksheet. This was my documentation as I addressed the specimen and no one else's documentation was altered by me.

Further, there is no indication that Micro worksheets are a part of the Consolidated Health Records (CHR) which are the subject of Memorandum 136-04-09. If the memorandum is meant to apply to this documentation, then it is ambiguous and must be construed against the drafting party.

Additional fact errors are as follows. At page 4 of the decision, the Board stated that I informed Dr. Vacchani about the problem with the spinal fluid. This did not occur until the day before the patient died. I had no idea the treating physician had been left in the dark. The Board states that I reported the incident to Ratliff. The patient died 2/16/05. Ratliff testified that he did not arrive in Montgomery until June of 2006. What I reported to Ratliff was my belief that there had been a coverup. The Board states that I forwarded the worksheets to the Joint Commission on Hospital Operations. There is absolutely no evidence that I did so. There is no evidence that I "altered" the worksheets. I redacted information specific to the patient prior to Faxing the sheets to the OSC.

The MSPB cites *Heath v. DOT*, 64 MSPR 638 (1994) in support of this decision. But Health took copies of documents containing co-workers social security numbers to his attorney. I made copies for the sole purpose of disclosure to the OSC and both the DVA and the MSPB knew this. The MSPB takes the position that I "could have and should have recommended to OSC that they subpoena the documents." But the OSC does not have the authority to investigate the disclosures that it receives. In fact, the OSC request that you send "any documents that might support your disclosure."

I cited *Kent v. General Services Administration*, 56 MSPR 536(1993) to the MSPB. Both the MSPB and the court below chose to ignore this case. My disclosure was protected under 5 U.S.C. Section 2302(b)(8). In Kent the MSPB stated–

> "While we agree that substantive agency regulations may have the force and effect of law in other contexts, we find that the statutory language, coupled with the legislative history of the CSRA, subsequently amended by the WPS, evidences a clear legislative intent to limit the term "specifically prohibited by law" in section 2302(b)(8) to statutes and court interpretation of those statutes.
>
> The phrase "specifically prohibited by law" follows other statutory language referring to a "violation of any law, rule, or regulation," thereby indicating that the term "law" was not intended to encompass rules or regulations. The statutory language provides that the only other exception to the protections afforded to these disclosures is where "such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." Finally, we find that Congress concern with internal agency rules and regulations impeding the disclosure of government wrongdoing, see S.Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), reprinted in 1978 US Code & Admin.News 2723,2743, is consistent with this restrictive reading to the statutory language."

They further stated-

"Under the statutory scheme, 2302(b)(8) affords protection from a personnel action taken for the disclosure of such confidential information only where it is made to the Special Counsel, the Inspector General, or a designated agency contact."

The JOINT EXPLANATORY STATEMENT on S. 508 found at 135 Cong.Rec. 4512,5032 states in part:

"There should be no doubt about legislative intent in passing this bill. Individuals should be able to go to the Special Counsel to make a disclosure under section 1213 of title 5, United States Code to complain about a prohibited personnel practice under section 1214, or to allege a violation of another law within the jurisdiction of the Special Counsel under section 1216, without any fear that the information they provide or the investigation their disclosure triggers is used against them."

Of great significance to this case is the LEGISLATIVE HISTORY SENATE REPORT NO. 103-358, 3549, 3559 which references PUBLIC LAW 103-424 (H.R. 2970); October 29, 1994 as follows:

"As indicated above, the plain language of the Whistleblower Protection Act extends to retaliation for "any disclosure", regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made."

These laws and legislative history surely apply to my OSC disclosure.

This DVA action violates the Anti-Gag Statute by spending public funds to curtail my rights under the WPA.

The Anti-Gag Statute has been in effect since 1988. The current statute is found at SEC 820 of the Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act of 2006, which became PL 109-115 on November 30, 2005: SEC. 820. In pertinent part:

> "No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other non- disclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: 'These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the WPA (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing

disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783 (b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive order and listed statutes are incorporated into this agreement and are controlling': Provided, that not withstanding the preceding paragraph, a non- disclosure policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such non-disclosure forms shall also make it clear that they do not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial violation of law".

Petitioner's disclosure is protected by not only the CSRA but also the WPA. The DVA had no right to propose or to take any personnel action based on this disclosure. Further, the DVA continues to spend funds to defend this prohibited personnel practice.

My disclosure to the OSC was THE reason for my termination. At the bottom of pg. 14 of the MSPB decision, the Board states that the deciding official (Ratliff) testified that the taking of medical records and releasing them to a third party was "very serious". But on the next page, the Board finds the deciding official without retaliatory motive because "Ratliff testified that it was fine for employees to make protected disclosures of information to third parties." The Board found me guilty of conduct not included in the charges or the specifications. At page 17 of the Board's decision, the Board states, "the appellant's act of altering the medical record by eliminating the notation of no growth" and then writing her opinion upon in that the sample was mishandled was grievous misconduct."

I wasn't charged with eliminating the notation. Further, see Ratliff s testimony at pages 17 through 9 of the hearing transcript as follows:

MR. BOULWARE: Look under entry K, page 4. Tab K-4-K-page 4.

A. (Witness reviews document.) Okay. Yes, I saw this document.

Q. You saw both of them?

A. Uh-huh.

Q. The spinal fluid and the blood? The autopsy? The next page– you saw both of them?

A. Yeah.

Q. Up at the top of the page we have "Microbiology Worksheet." And you do acknowledge that I redacted both of these pages?

A. When you say "redacted", do you mean you removed something?

Q. I cut out the patient's name and Social.

A. Okay.

Q. You were aware of that?

A. Yes.

Q. I want you to go over to 6, the next page, 6. And we have an un-redacted copy that you all provided.

A. (Witness reviews document.) Yes.

Q. What do you know specifically about how this specimen was handled?

MS. KING: And Judge, an aside: I'm not trying to get into whether or not I was right or I was wrong. I want to show motivation, failure to clearly–

THE COURT: I understand.

Q. What do you know about this specimen, this situation, this patient, from the get-go?

A. Well, what I noticed here is these two documents look different. It looks like the copy that you gave me is different than the copy– 4 is different from

6. It looks like it has been removed – "No growth, 7 days."

Q. Does it look like it was removed or when you look at No. 6, do you note that the annotation made on 2/8 by Susan is a little bit lighter than my handwriting on 2/16 and 3/17? And have you made multiple copies on Xerox machines or copy machines, and have you noted that the more that you make, the lighter the writing can be?

A. No, I haven't made any copies of anything.

Q. Can you tell me what would be the motive in obscuring 2/18, "No growth, 7 days"?

A. I have no idea.

Q. Is that you contention, that I obscured this notation?

A. I'm not contending anything. I just pointed out that it looked different.

As to the 3/17/05 notation, the DVA objected to it based on that fragmentary portion of Memorandum No. 136-04-09 "negative critical documentation carry medico-legal implications and will not be indulged."

The MSPB takes the position that neither the proposing official (Singh) or the deciding official (Ratliff) were motivated to retaliate.

Singh proposed the termination in July. I responded to Ratliff with the material at agency

exhibit 4j. In part– "In 2003 I made a report to the VA's OIG. Dr. Chava's response (Exh A) was full of incorrect and incomplete information. OIG accepted his response and closed the file without further action. Because of this experience I attempted to send my report concerning Mr. Thomas (see Exh. C– you office included this in the evidence file FedEx'd to me on 7/28/06) to the Secretary of Veteran's Affairs via the Office of the Special Counsel.

No later than mid August, Ratliff knew the material went to the OSC as a disclosure. In *Detrich v. Department of the Navy*, Fed. Cir. No. 2007-3100 (2007) the court stated:

> "The WPA does not permit an agency to discipline an employee for disclosing protected information merely because that information has been reported outside the chain of command. An agency cannot require that protected disclosures be made only to supervisory personnel."

During the same time that the Merit Systems Protection Board was considering my case, they were considering *Pedeleose v. Department of Defense*, AT-0752-06-0350-I-1. It is clear that they spent many hours on this case. The Board mentioned Senator Grassley's name 5 times and Senator McCain's 3 times in this decision. I don't grudge any whistleblower a victory. I just don't understand how the Board could make such a clearly erroneous finding in my case and favor Pedeleose with such hoop jumping. Is having Senator Grassley in your corner required before the MSPB will make rational decisions? Because if that is

the case, I am not only out of a home and a job. I am slap out of luck.

REASONS FOR GRANTING THE PETITION

The United States Congress has repeatedly had to strengthen protection for whistleblowers. They were aware of government agency ploys as to "progressive" disciplinary actions directed at whistleblowers and this is why we have the right to appeal even a one day suspension to this Court. Currently, the only avenue of appeal is through the U.S. Court of Appeals for the Federal Circuit. Congress is formulating a law to allow whistleblowers to take appeals to the other federal circuits. If they override the promised presidential veto, then the only precedent available to the other circuits will be the Federal Circuit for Federal Appeals decisions. Congress is changing the law because they are well aware of the Federal Circuit hostility to whistleblowers. In *Waters v. Churchill*, 511 U.S. 661 (1994) Justice Scalia stated:

> "Moreover, the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system. See e.g., Whistleblower Protection Act of 1989."

Further, "If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognized that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care." "It should, however, be the care that a reasonable

manager would use before making an employment decision-discharge, suspension, reprimand, or whatever else-of the sort involved in the particular case."

The lower court failed to follow the Supreme Court's position that "[I]n cases raising the First Amendment issues we have repeatedly held that an appellant court has an obligation to 'make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression'," quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964).

The Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit must not be allowed to ignore the laws of this nation nor their own case law. The United States Supreme Court must exercise its supervisory powers to protect those of us who seek to protect our fellow citizens from the abuse of those who would destroy the careers and lives of responsible federal employees. Please do not deny us justice.

See Legislative History Senate Report No, 103-358. Both Houses joined in stating "There should be no doubt about legislative intent in passing this bill. Individuals should be able to go to the Special Counsel to make a disclosure under section 1213 of title 5, United States Code to complain about a prohibited personnel practice under section 1214, or to allege a violation of another law within the jurisdiction of the Special Counsel under section 1216, without any fear that the information they provide or the investigation their disclosure triggers is used against them."

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

Diane King
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Deatsville, AL 36022
Phone: 334-414-1769

Petitioner Pro Se

Date: November 24, 2008

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2008-3043

[DECIDED: May 6, 2008]

DIANE KING,	)
	)
Petitioner,	)
	)
v.	)
	)
DEPARTMENT OF VETERANS AFFAIRS,	)
	)
Respondent.	)
	)

Diane King, of Deatsville, Alabama, pro se.

Robert C. Bigler, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With him on the brief were *Jeffrey S. Bucholtz*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director.

Petition for Review of the Merit Systems Protection Board in AT0752070136-I-1

Before NEWMAN, MAYER and SCHALL, *Circuit Judges.*

PER CURIAM.

Diane King appeals the final order of the Merit Systems Protection Board denying her petition for review of the initial decision affirming the Department of Veterans' Affairs ("agency") action in removing her from the position of Medical Technologist, GS-9, on the following two charges: (1) copying and removing confidential medical records, and (2) altering a patient's medical records a month after his death by eliminating a notation and adding a personal opinion regarding alleged specimen mishandling. *King v. Dept. of Veterans Affairs,* No. AT-0752-07-0136-I-1, (M.S.P.B. Oct. 9, 2007). The board concluded that there was no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation affecting the outcome. *Id.*; 5 C.F.R. § 1201.115(d). We affirm.

King was removed from her position as a Medical Technologist at the Central Alabama Veterans Health Care System in Montgomery, Alabama, on October 18, 2006. In February, 2005, she heard from her supervisor that a medical lab technologist had found yeast cells present in a spinal fluid sample that was refrigerated overnight without nutrient added to it, and that this sample was used on a patient who died a few days later. She concluded that the sample was mishandled and may have been a factor in the patient's death, and reported the incident to the agency's director, who confirmed that an inquiry into the matter would follow. Before receiving the results of the agency's inquiry, she altered the patient's

microbiology worksheet about a month after the patient's death, took copies home, and faxed them to the Joint Commission on Hospital Operations and to the Office of Special Counsel ("OSC") as part of a complaint. The board found that she eliminated an entry on the worksheet dated February 18, "No growth 7 days" and added the entry "3/17/05 Dr. Vacchani not informed specimen mishandled." The agency removed her from service on charges of (1) copying and removing confidential medical records; (2) failing to follow policy regarding rejection of unacceptable specimens; (3) failing to follow procedures for reporting problems that could potentially interfere with patient care; and (4) failing to follow procedures for making entries to patient records. The board sustained the agency's charges (1) and (4), and affirmed the removal action.

On appeal, King asserts that the board erred in affirming the agency action because the termination was a prohibited personnel practice. She reiterates her status as a whistleblower, argues that the microbiology worksheet is not a medical record, and that the Whistleblower Protection Act ("WPA") protects her disclosures to OSC.

The scope of our review in an appeal from a decision of the board is limited. Generally, we must affirm the decision unless we find it to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Under the WPA, employees with the authority to take personnel actions are forbidden to do so as a result of any

disclosure of information by an employee that the employee reasonably believes evidences (1) a violation of law, rule, or regulation, or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). The board must order corrective action if an employee proves that a disclosure under section 2302(b)(8) contributed to an adverse personnel action, unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *See id.* § 1221(e)(1), (2).

The board found, and the parties do not dispute, that King made protected disclosures, that she was removed from service following such disclosures, and that the disclosures were a contributing factor in the removal action. Before us is whether the board's decision that the agency met its burden of proving by clear and convincing evidence that it would have removed her even in the absence of her protected disclosures is correct, *see Marano v. Department of Justice,* 2 F.3d 1137, 1141 (Fed. Cir. 1993), and whether the penalty was within the tolerable limits of reasonableness.

After receiving evidence and live testimony that agency policy defines microbiology worksheets as medical records, the board concluded that the worksheets at issue are medical records, and that the agency proved the facts of the sustained charges. The board also concluded that the agency met its burden of proof because it demonstrated that it would have taken the removal action regardless of the protected disclosures due to the seriousness of her misconduct–altering, copying, and removing

confidential medical records–compounded by incidents of previous misconduct that resulted in reprimands and disciplinary action, including making false statements about VA personnel, disrespectful conduct, and failing to comply with a request from her immediate supervisor. It also concluded that the agency officials involved were not motivated to retaliate against King for her protected disclosures.

Substantial evidence supports the board's conclusion that King violated agency policy when she (1) took the records to her home, thus removing the agency's property from its custody without authorization, and (2) added post-hoc critical documentation to the medical record a month after the patient's death occurred. She could have disclosed her first-hand knowledge regarding the alleged specimen mishandling and cover-up she perceived to OSC without altering, copying, removing to her home, and releasing confidential agency-owned medical records to OSC without following agency procedures for doing so. With respect to the removal penalty, the board balanced the relevant *Douglas* factors, including King's prior disciplinary history, the gravity of her misconduct, and its relation to the efficiency of the service and determined that the penalty of removal was within the tolerable limits of reasonableness. Because the board applied the appropriate legal standards, and substantial evidence supports its conclusions, its decision must stand.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2008-3043

[DECIDED: May 6, 2008]

DIANE KING,	)
	)
Petitioner,	)
	)
v.	)
	)
DEPARTMENT OF VETERANS AFFAIRS,	)
	)
Respondent.	)
	)

JUDGMENT

ON APPEAL from the Merit Systems Protections Board

in CASE NO(S). AT0752070136-I-1.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly, /S.W
Jan Horbaly, Clerk

DATED MAY 06 2008

ISSUED AS A MANDATE: July 31 2008

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER:
AT-0752-07-0136-I-1

[DATE: October 9, 2007]

DIANE KING,	)
	)
Appellant,	)
	)
v.	)
	)
DEPARTMENT OF VETERANS AFFAIRS,	)
	)
Agency.	)
	)

Diane King, Deatsville, Alabama, pro se.

W. Robert Boulware, Esquire, Montgomery, Alabama, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov.

Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Washington, D.C.

_____

Matthew D. Shannon
Acting Clerk of the Board

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DOCKET NUMBER
AT-0752-07-0136-I-1

[DATE: April 13, 2007]

DIANE KING,	)
	)
Appellant,	)
	)
v.	)
	)
DEPARTMENT OF VETERAN AFFAIRS,	)
	)
Agency.	)
	)

Diane King, Deatsville, Alabama, pro se.

W. Robert Boulware, Montgomery, Alabama, for the agency.

BEFORE
Stuart A. Miller
Administrative Judge

INITIAL DECISION

INTRODUCTION

On November 15, 2006, the appellant timely filed an appeal from the agency action removing her from her position of Medical Technologist, GS-9, with the Specialty and Diagnostic Services of the Agency's Health Care Systems in Montgomery, Alabama, effective October 18, 2006. The appellant's removal was based on charges of: (1) Copying and removing confidential medical records; (2) failing to follow policy regarding rejection of unacceptable specimens; (3) failing to follow procedures for reporting problems that could potentially interfere with patient care, i.e., failure to notate the problems in the log book; and, (4) failing to follow procedures for making entries to patient records.

The Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7511(a)(1)(A), 7512(l), 7513(d) and 7701. The hearing requested by the appellant was held on March 7 & 8, 2007, in Montgomery, Alabama.[1] For the reasons below, the agency's action is AFFIRMED.

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[1] At the close of the hearing, the record was left open for the purpose of allowing the parties to submit written closing statements. Those closings were required to be filed such that they were received by the Administrative Judge no later than March 18, 2007. The appellant's closing argument was received on time; the agency's closing argument was one day late. Because the agency did not show good cause for the untimely filing, the agency closing argument was not considered.

BURDENS OF PROOF

The agency must prove: (1) its charges by preponderant evidence. 5 U.S.C. § 7701(c)(1)(B); (2) the existence of a nexus between the sustained charge(s) and the efficiency of the service, 5 U.S.C. § 7513(a); and (3) the reasonableness of its penalty, *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 307-08 (1981).

The appellant bears the burden of proving her affirmative defenses by a preponderance of the evidence. *See* 5 C.F.R. § 120 1.56(a)(2)(iii).

ANALYSIS AND FINDINGS

1. The charges are sustained

As noted above, the agency brought four charges against the appellant in this removal action. Those charges are: (1) Copying and removing confidential medical records; (2) failing to follow policy regarding rejection of unacceptable specimens; (3) failing to follow procedures for reporting problems that could potentially interfere with patient care, i.e., failure to notate the problems in the log book; and, (4) failing to follow procedures for making entries to patient records. All of the charges result from the processing of a spinal fluid sample on VA patient #0668 and the appellant's actions thereafter. The material facts are not in dispute.

There are two units of the Specialty and Diagnostic Services where the appellant was employed. One unit is called the East Campus and the appellant worked in the other unit, the Montgomery Campus, the primary

or main facility. During the evening of February 5, 2005, a spinal fluid sample, in a blood culture bottle, for patient #0668 was received at the East Campus. Lisa Burchfield, Medical Lab Technologist, GS-9, received and initially processed the spinal fluid sample. Upon examination of the sample, Burchfield noted that there were a few yeast cells present in the sample. Burchfield then arranged for a courier to take the sample over to the main facility for further examination. But, the couriers did not pick up the sample that evening. Instead, the sample sat cold in a refrigerator at the East Campus until the next day. And, Burchfield did not put any Fildes reagent (nutrient) into the sample because the East Campus had run out of the reagent. When the sample was finally delivered to the Montgomery campus the next day, the appellant noticed that the bottles, contained in a biohazard bag, were cold. However, the appellant testified that she had no further interaction with the sample.

Because of the serious nature of a finding of some yeast cells in a spinal fluid sample, Susan Meeks, Supervisory Medical Technologist, examined the sample again. Meeks saw no evidence of yeast in the sample. To be sure, Meeks coordinated with Dr. Madhuri Singh, Chief of Pathology and Lab Medicine, who also examined the sample and found no evidence of yeast in the spinal fluid sample.

The appellant testified that she heard from Meeks that Burchfield found some yeast cells in the sample, that the sample was refrigerated over night and that Burchfield did not place any nutrient into the sample. She believed that the sample was mishandled, that the combination of these two events, the lack of nutrient

and the refrigeration of the sample, caused the yeast cells, visually observed in the sample by Burchfield, to die. And that is why both Meeks and Dr. Singh did not observe any yeast cells in the sample. Indeed, the appellant testified that she informed the patient's treating physician, Dr. Vacchani, about this problem and that he was both concerned and angry. Patient #0668 died a few days later on February 15.

The appellant believed that the mishandling of the spinal fluid sample may have been a factor in the patient's death. The appellant reported the incident to the Director, Dr. Robert W. Ratliff. Dr. Ratliff assured the appellant that there would be an inquiry into the matter. And, indeed, Dr. Ratliff had the matter examined. Dr. Ratliff testified that there was also a peer review of the incident and the peer review determined that the action taken was appropriate.

In the meantime, the appellant grew weary waiting to hear some result from her reporting the mishandling of the spinal fluid sample. She made copies of the microbiology worksheet so she could forward them to the Office of Special Counsel as part of a complaint and also to the Joint Commission on Hospital Operations, she altered the worksheet and on March 17, a month after the patient's death, she wrote on the worksheet that "Dr. Vacchani not informed specimen mishandled."

The second and third charges brought against the appellant allege that she failed to follow procedure regarding the rejection of unacceptable samples and that she failed to follow procedure for reporting problems, *i.e.*, that she should have made an entry in the log book about the lack of nutrient and

refrigeration of the sample. Burchfield testified that she received and processed the sample at the East Campus. She acknowledged that she failed to put nutrient in the sample because the East campus was simply out of the nutrient. And, she acknowledged that she should have made the entry in the log book. Meeks testified that Burchfield was counseled for her failure to make the log book entry.

While there was some testimonial dispute about the level of the appellant's involvement with the sample when it reached the Montgomery campus, the appellant's testimony was that she had no responsibility for the sample, she knew what she knew from Meeks. And, Meeks testified that, when the sample was received at Montgomery campus, she took control of the sample, examined it and arranged for Dr. Singh to examine it. Thus, I find the appellant's testimony in this regard credible, that she had no involvement with or responsibility for the spinal fluid sample on patient #0688. Thus, because the appellant had minimal involvement with and no responsibility for the sample, she had no duty to make the log book entry and no duty to reject the sample. Accordingly, she could not have failed to follow procedure for either and the two charges in this regard, charges 2 and 3, are not sustained.

However, the appellant admits that she made copies of the microbiology worksheet and she distributed them to third persons, entities outside of the agency such as the Office of Special Counsel. In doing so, she also altered the records by dedacting the appellant's name and social security number and also by eliminating an entry on the worksheet dated February 18, "No growth 7 days." She also admits that

she also wrote on the worksheet, a month after the patient's death, "3/17/05 Dr. Vacchani not informed specimen mishandled."

Thus, while the appellant admits to the facts alleged in charges 1 and 4, she presents two defenses to these charges. First, the appellant alleges that she did not violate the policies referenced in the agency's notice of proposed removal because the record at issue here, the microbiology worksheet, is not a medical record and the policies regarding release of information (charge 1) and making entries (charge 4) pertain only to medical records. Second, the appellant asserts that she was obligated, duty-bound to report the mishandling of the sample, to protect veterans from such mistakes in the future and also to bring to light the wrongdoing that occurred here. Thus, because her motive is pure, her misconduct should be excused.

The appellant argues that the microbiology worksheet is not a medical record or, at least, not a confidential medical record. She states that the agency policy on release of information is based on the Privacy Act, the Privacy Act does not cover this particular record and, thus, the agency policy likewise can not cover this particular record. For, in her view, the policy can not contradict the Federal law. The appellant's argument is incorrect. Even though the Privacy Act is the basis on which the agency policy is written, and even if the Privacy Act does not apply to records of deceased individuals as the appellant argues, the agency policy may be more inclusive than the Federal law. Supplementing the law with additional coverage is not a contradiction of law. *Cf. Burge v. Department of the Air Force,* 82 M.S.P.R. 75 (1999) (an agency may apply its own leave procedures to leave requests under

the FMLA, but the agency may not apply a more restrictive leave policy than that provided under the FMLA and may not deny an employee leave under the FMLA for failure to follow the agency's leave procedures). Herein, the agency may consider and require that microbiology worksheets be treated as medical records under its own policies.

Dr. Ratliff, Dr. Singh and Michael C. Hubbard, Compliance and Business Integrity Officer, all testified that the microbiology worksheets are medical records. And their testimony is supported by the language of subparagraphs 2 and 5 on page 8 of the Medical Record Management and Documentation policy. Agency File Tab 4H. In discussing discharge summaries, subparagraph 2 references significant procedures (procedures that carry a procedural risk) and subparagraph 5 requires the summary include laboratory findings. Thus, even though the agency stores the microbiology worksheets near the morgue[2], I find that they are, nonetheless, confidential medical records.

Accordingly, the appellant's "legal" defense to both charges fails. As to her second defense, that her motives excuse her misconduct, that is a matter for penalty consideration, not a defense to the charges. Accordingly, I find that the agency proved charges 1 and 4 by a preponderance of the evidence and both charges are sustained.

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[2] The appellant asserts that because the agency stores these records near the morgue, it evidences the agency's lack of respect for and safeguarding of these records so that they should not be considered medical records. Where the records are stored is of no importance in determining if a document is a medical record.

2. Nexus

The sustained misconduct, copying and removing confidential medical records and failing to follow procedures for making entries to patient records, bears a direct nexus to the efficiency of the service. *See Health v. Department of Transportation,* 64 M.S.P.R. 638 (1994).

3. The appellant failed to prove her affirmative defenses

The appellant raised the affirmative defenses of discrimination based on race, sex, age, religion and disability. She also raised the affirmative defenses of retaliation for filing complaints of discrimination and retaliation for whistleblowing.

a. Race, Sex, Age and Religious Discrimination

There are two theories of discrimination: disparate treatment, which is the most common claim of discrimination, and disparate impact. Herein the appellant is relying on the theory of disparate treatment and also direct evidence.

The elements of a claim of discrimination on the ground of disparate treatment are: (a) that the appellant is a member of a protected group; (b) that she was similarly situated to an individual who was not a member of the protected group; and (c) she was treated more harshly or disparately than the individual who was not a member of his protected group. *Buckler v. Federal Retirement Thrift Investment Board,* 73 M.S.P.R. 476, 497 (1997). Once the appellant has established a prima facie case, the

burden shifts to the agency to articulate a legitimate nondiscriminatory reason for the agency's actions. Finally, once the agency has articulated a legitimate nondiscriminatory reason for its actions, the burden shifts to the appellant to show that the agency's proffered explanation constitutes a pretext for discrimination. To do so, the appellant must establish that the stated reason was false or not the real reason for the action and that discrimination was the real reason. *Carter v. Small Business Administration*, 61 M.S.P.R. 656, 665 (1994).

An individual may also establish discrimination by direct evidence. Such claims are analyzed under the framework of *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) Therefore, to prove a discrimination claim by direct evidence he must show that membership in a protected category was a "substantial factor" in the action appealed. *Johnson v. Defense Logistics Agency,* 61 M.S.P.R. 601, 604 (1994). If such a showing is made, the burdens of production and persuasion shift to the agency to show a legitimate motive sufficient to account for its actions. *Id.*

Further, as regards her claim of religious discrimination, the appellant may allege and prove such discrimination based on a failure to accommodate her religious beliefs. To establish a prima facie case of discrimination based on a failure to accommodate one's religious beliefs, the appellant must show: (a) that she has a bona fide religious belief that conflicts with an employment requirement: (b) that she informed her employer of her religious belief: and (c) that she was disciplined or otherwise adversely affected for her failure to comply with the conflicting employment requirement. *Morley v. Frank*, EEOC Petition No.

01912015 slip. op. at 4-5 (Aug. 16, 1991) (citing *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)). After the appellant has established a prima facie case, the burden shifts to the agency to demonstrate that it made a good faith effort to reasonably accommodate the appellant's religious beliefs or that the alternative means of accommodation proffered by the appellant could not be granted without imposing an undue hardship on its operations. *Morley*, slip op. at 5 (citing *Redmond v. GAF Corporation*, 574 F.2d 897, 902 (7th Cir. 1978); *Cardona v. Frank*, EEOC Request No. 05890532 (Oct. 25, 1989)). The agency may establish that there will be undue hardship if the agency can show that the accommodation will require more than a de minimis cost. *Id.* (citing *Hardison v. Trans World Airlines*, 432 U.S. 63, 84 (1977)). Thereafter, the burden shifts back to the appellant to show that the agency's reasons are a pretext for discrimination.

The appellant is a Caucasian female, Christian, over the age of 40. As a comparative employee for these discrimination defenses, the appellant cites to Lisa Burchfield, who received only a counseling for Burchfield's failure to make the proper notations in the log book about the spinal fluid sample. Burchfield is a Caucasian female, like the appellant. Burchfield's age was not made a matter of record. Moreover, Burchfield is not a valid comparator because, herein, the appellant was charged with additional misconduct of which two charges were sustained. And, Burchfield does not have a prior disciplinary record; whereas the appellant has a prior disciplinary record of a reprimand, 1-day suspension and 14-day suspension. And, this was all the evidence offered by the appellant on these defenses based on disparate treatment.

The appellant offered little to no direct evidence of discrimination based on race, sex, age and religion. As for religious discrimination, she testified that there was a religious cult called Avatar in the microbiology laboratory which she was invited to join but declined to do so. Meeks testified that she and only two other employees were members of Avatar and that Avatar is not a religion, nor is it a cult. She added that Avatar is a group of people who share a philosophy where they try to "experience things based on life experiences." There was no evidence that the officials who took the action against the appellant were members of Avatar or were even aware of Avatar.

Accordingly, based on all the above. I find that the appellant failed to prove these affirmative defenses by a preponderance of the evidence and these affirmative defenses fail.

b. Disability Discrimination

There are three theories of disability discrimination: reasonable accommodation (the most common claim of disability discrimination), disparate treatment, and disparate impact. The appellant herein is alleging disability discrimination based on accommodation, disparate treatment and direct evidence.

(1). Accommodation

To establish a prima facie case of disability discrimination based on a failure to accommodate, the appellant must show: (a) that she is an individual with a disability under 29 C.F.R. § 1630.2(g) and that the action appealed to the Board was based upon her

disability; and (b) that she is a qualified individual with a disability, that is, that she satisfies the job-related requirements of her job and can perform the essential functions of the position with or without reasonable accommodation. *See* 29 C.F.R. §§ 1630.2 (m), 1630.3. After the appellant has established a prima facie case, the burden shifts to the agency to demonstrate that reasonable accommodation would impose an undue hardship on its operations. Thereafter, the burden shifts back to the appellant to show that the agency's reasons are a pretext for discrimination.

(2). Disparate Treatment

The elements of a claim of disability discrimination on the ground of disparate treatment are: (a) that the appellant is a member of a protected group;[3] (b) that she was similarly situated to an individual who was not a member of the protected group; and (c) she was treated more harshly or disparately than the individual who was not a member of her protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). Once the appellant has established a prima facie case, the burden shifts to the agency to articulate a legitimate nondiscriminatory reason for the agency's actions. Finally, once the agency has articulated a legitimate nondiscriminatory reason for its actions, the burden shifts to the appellant to show that the agency's proffered explanation constitutes a pretext for discrimination.

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[3] To do so, the appellant must establish that she has a disability within the meaning of 29 C.F.R. § 1630.2(g).

(3). Direct Evidence

The appellant may also prove a claim of disability discrimination by direct evidence. To prevail on that claim, the appellant must prove that discrimination was a motivating factor in the agency's action. *See Jones v. Department of the Army,* 68 M.S.P.R. 398, 403 (1995).

The appellant testified that she suffers from post-traumatic stress disorder (PTSD), cyclothymia (the beginning or early stages of bi-polar disorder according to the appellant), heart disease and headaches. And, the agency's witnesses testified that they knew the appellant was previously hospitalized with a heart attack. But, the appellant proffered no medical evidence in support of her disability claim. I must find therefore, that though the appellant has these medical conditions, there is no evidence that these conditions, taken separately or as a whole, interfere with a major life function. Accordingly, the appellant failed to establish that she is a disabled person and her affirmative defense of disability discrimination must fail.

c. Retaliation for filing EEO complaints

To establish a prima facie case of retaliation for filing an EEO complaint, the appellant must show that: (a) she engaged in protected activity; (b) the accused official knew of the protected activity; (c) the adverse employment action under review could, under the circumstances, have been retaliation; and (d) there was a genuine nexus between the retaliation and the adverse employment action. *See Cloonan v. United States Postal Service,* 65 M.S.P.R. 1, 4 (1994). To

establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the employment action was taken because of the protected activity. *Id.* at n.3. If the appellant meets this burden, the agency must show that it would have taken the action even absent the protected activity. *See Rockwell v. Department of Commerce,* 39 M.S.P.R. 217, 222 (1989).

There is no dispute that the appellant, during her tenure with the agency in Montgomery, filed complaints of discrimination. And, both the proposing official and deciding officials knew of her complaints. But, that was all the evidence the appellant introduced in support of her affirmative defense. Thus, while she engaged in this protected activity and management was aware she had done so, there is absolutely no evidence that there is a causal connection or genuine nexus between the protected activity and the removal action herein. Accordingly, I find that the appellant failed to prove this affirmative defense by a preponderance of the evidence and this defense must fail.

d. Retaliation for whistleblowing

To prove a prima facie case of retaliation for whistleblowing, the appellant must prove by preponderant evidence that: (a) she made a disclosure protected by 5 U.S.C. § 2302(b)(8); and (b) it was a contributing factor in the personnel action being appealed. If the appellant meets this burden, the agency must prove by clear and convincing evidence that it would have taken the same action even absent the disclosure. *See Horton v. Department of the Navy,* 66 F.3d 279, 283-84 (Fed. Cir. 1995).

Herein, the appellant alleges that she made disclosures that evidence both a violation of law, rule or regulation and a specific danger to public health and safety. Whether or not an employee's belief that a disclosure evidences a violation of law, rule or regulation is determined based on an objective analysis of all the pertinent facts. As stated by the United States Court of Appeals for the Federal Circuit, the test is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would conclude that there has been a violation of a law, rule or regulation. *See LaChance v. White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999).

Even before her tenure with the agency began and throughout her time of employment with the agency, it is undisputed that the appellant made disclosures that she believed evidenced a violation of law, rule or regulation or presented a specific danger to public health and safety. *See* Appeal File, Tab 10 (list and summary of the appellant's disclosures). These disclosures included, but are not limited to: refusing to hire preference-eligible veterans; failing to report "incompatibility with life" hemoglobin levels on a patient; using outdated reagents; neglecting patients (several such disclosures); misdiagnosing and treating patients; hazardous working conditions; lying to the Inspector General; and, violating document retention regulations. The agency does not dispute that the appellant made these disclosures or that she reasonably believed them to be true at the time the disclosures were made.

Further, as shown above, the appellant reported that the spinal fluid sample on patient #0688 was

mishandled. She claims that this incident was both a violation of law, rule or regulation and a specific danger to public health and safety. The appellant's basis for reasonably believing that the sample was mishandled is that yeast die in cold temperatures and the sample in question was refrigerated over night. Moreover, the failure to use nutrient also contributed to the yeast dying. The agency contests the appellant's reasonable belief.

Dr. Singh disagrees with the appellant. She testified that the cold temperature here would not have killed the yeast and nutrient was not necessary for the yeast to survive. She explained that yeast was found in the patient upon autopsy, the yeast was in the abdominal region, not the spine. Thus, the reading of "no yeast" in the initial examination by her and Meeks was correct. But, Dr. Singh is using after-the-fact results in her analysis. The question to be answered is whether the appellant had a reasonable belief at the time she made the disclosure.

Lisa Burchfield testified that she should have put nutrient in the sample but the East campus was out of nutrient. Sandra Daw, Microbiologist Technician with 35 years experience, 20 of those years with the agency, testified in support of the appellant's assertions that yeast will die in cold temperatures and that nutrient is needed to keep such samples alive. Thus, her belief was based on her own experience and was corroborated by others. Accordingly, I find that the appellant had a reasonable belief that the sample was mishandled and her disclosure was protected as both a violation of law, rule and regulation as well as a specific danger to public health and safety.

Further, because this last disclosure occurred a short time prior to this removal action and the charges in the removal action involved the same facts in her disclosure, I must find that the appellant's whistleblowing was a contributing factor in the removal action herein. Thus, the burden is on the agency to prove by clear and convincing evidence that it would have taken the same action even absent the protected whistleblowing activity. And for the reasons below, I find that the agency has met that burden.

Ordinarily, when determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following factors: The strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are similarly situated. *See Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

The evidence in support of the two sustained charges in this case is extremely strong and the proven misconduct is, at a minimum, extremely serious. Dr. Ratliff testified that charge 1, the taking of the medical records and releasing them to a third party, was "very serious." And, he noted that the alteration of the record and the appellant's writing "her opinion" on the record was also very serious. Notably, Dr. Ratliff did not mention the other two charges, which have not been sustained, in testifying about the seriousness of the appellant's misconduct. As shown above, the appellant does not dispute that she copied and

disseminated the microbiology worksheet. And, she does not deny that she, a month after the patient died, wrote on that worksheet, her opinion that the sample was mishandled. The agency's witnesses, Dr. Ratliff, Dr. Singh and Mr. Hubbard all expressed concern over the dissemination of the medical record and the potential impact of the appellant's alteration and "opinion" being written on the record. Hubbard testified that the HIPPA laws may have been violated by the appellant's actions.

As to the motive to retaliate, Dr. Singh testified that she did not consider the appellant to be a whistleblower. And, Dr. Ratliff testified that it was fine for employees to make protected disclosures of information to third parties.

For her part, the appellant asserts that the records in her prior individual right-of-action appeals (dealing with a promotion board, a reprimand, a 1-day suspension and a 14-day suspension) show that the agency was motivated to remove her because of her whistleblowing activity. But, the most telling part of those records, is that the appellant did not prevail in any – no corrective action was ordered. Moreover, the fact that the agency has followed progressive discipline speaks to the agency's attempts to correct the appellant's behavior and not a matter of retaliation.

The appellant also argues that a memorandum, issued by Vera Robinson on January 17, 2007, illustrates the agency's motive to retaliate. Appellant's

Exhibit K, page 1.[4] In this memo, Ms. Robinson admonishes all the employees in the Pathology and Laboratory Service to follow the chain of command in raising issues and warns that a failure to comply "will result in escalation [sic] disciplinary action." But, while this memo is disturbing, it was not authored by either the proposing official. Dr. Singh, or the deciding official, Dr. Ratliff. Indeed, Dr. Ratliff testified that he wished the memo were better written and it mentioned other acceptable and permissible avenues of complaint and redress. Indeed, Dr. Ratliff's demeanor while testifying was that of a reflective, pensive individual concerned primarily with the level of care of the patients in his facility. And, he was most concerned with protecting their rights to privacy under both law and policy and with the safeguarding of hospital records. His demeanor did not, in any way, reveal a man seeking retaliation against an employee for engaging in legally protected activity.

The appellant also argues that she was treated differently than other employees in the facility. Dorothea McBride, Executive Assistant to the Director, testified that the appellant "got more attention than anyone else." But, this comment, in context, reveals that the appellant got this attention because her various complaints warranted examination and inquiry, not because management considered her "a trouble-maker." Indeed, McBride firmly denied that management thought of the

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[4] The appellant's Exhibit K is not tabbed separately in her prehearing submission. Rather, it appears after the documents in Exhibit J and is marked as "K" at the bottom right-hand corner of each page.

appellant in that way. Also, McBride noted that the appellant would courtesy copy many, many people, including McBride, with her e-mail complaints and demands for answers.

Thus, based on all the above, I find that the agency has shown by clear and convincing evidence that it would have taken the same action herein against this appellant even in the absence of her protected whistleblowing activity. Accordingly, this affirmative defense fails.

4. The penalty of removal is reasonable

The agency must establish that the penalty was reasonable under the particular circumstances of this case. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 307-08 (1981). The Board will review an agency-imposed penalty only to determine if the agency conscientiously considered all relevant factors and exercised management discretion within tolerable limits of reasonableness. *Id.* at 306. In making such a determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to ensure that managerial judgment has been properly exercised. *See Ingram v. Department of the Air Force*, 53 M.S.P.R. 101, 106, aff'd, 980 F.2d 742 (Fed. Cir. 1992) (Table); *Douglas*, 5 M.S.P.R. at 302. Thus, the Board will modify a penalty only when it finds that the agency's judgment clearly exceeded the bounds of reasonableness. *Id.* at 306.

Here, only two of the agency's four charges have been sustained. But, in his testimony, Dr. Ratliff

mentioned these two sustained charges as the very serious charges. And, I agree. In taking and disseminating a patient's medical record, the appellant violated a strong agency policy that has, as its progenitor, strong protective language in both the Privacy Act and HIPPA. The medical record/document was the property of the agency and it should not have been used by the appellant to support a complaint by the appellant – the appellant could have and should have recommended to OSC that they subpoena the documents. In *Heath v. Department of Transportation*, 64 M.S.P.R. 638 (1994) the Board stated, as to copying and disseminating government documents with sensitive and personal information therein, that the appellant's actions interfered with the agency's responsibility to ensure that such records are used only for the official government purpose for which they were created. The same is true in this case. And, in my view, the appellant's act of altering the medical record by eliminating the notation of no growth and then writing her opinion upon it that the sample was mishandled was grievous misconduct.

The appellant testified that she has an obligation, a duty, to protect her "brothers and sisters," the veterans. While her desire to see that veterans get the best care is commendable, it does not license her to engage in the egregious misconduct proven here. Further, her status as a whistleblower may not be used as a shield against her own misconduct.

Thus, based on all the above, I find that the agency's removal of the appellant was within the tolerable limits of reasonableness and promotes the efficiency of the service.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/
Stuart A. Miller
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on **May 18, 2007**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a Federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These

instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board

the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If

you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act 42 U.S.C. 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the Federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as

review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http:// fedcir.gov/contents. html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were). sent as indicated this day to each of the following:

	Appellant
US. Mail	Diane King 776 Myrick Road Deatsville, AL 36022
	Agency Representative
U.S. Mail	W. Robert Boulware Department of Veterans Affairs Regional Counsel Area Office (02) 345 Perry Hill Road Montgomery, AL 36109-4551

April 13, 2007

/s/
Yvonnie Ellis
Paralegal Specialist

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2008-3043

[Dated: July 24, 2008]

DIANE KING,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Petition for Review of the Merit Systems Protection Board in AT0752070136-I-1

ORDER

A petition for rehearing en banc having been filed by the Petitioner, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular activity service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on July 31, 2008.

FOR THE COURT,

/s/ Jan Horbaly /JB
Jan Horbaly
Clerk

Dated: 07/24/2008

cc: Diane King
Robert C. Bigler

KING V VA, 2008-3043
(MSPB - AT0752070136-I-1)